of the grantor's life making such damages highly speculative and conjectural.[12] Nor can the court undertake to grant specific performance,[13] the treatment, the kindness, so necessary to the proper performance of the contract cannot be specifically enforced.[14] There seems to be but one remedy that works equity to all parties, and that is rescission.[15] This is the relief afforded in most jurisdictions.[16] The majority rule was followed in the recent case of *Grant* v. *Swank* (W. Va.), 81 S. E. 967.

However, the grounds for a rescission by a court of equity are entirely unsettled, some cases taking the ground that if no other head of equity jurisdiction can be referred to, a fraudulent intent in the first instance will be presumed;[17] others that the situation engenders the belief that proper performance was never intended;[18] while still others are content to justify equitable interference on the broad ground of the inadequacy of the remedy at law.[19] It would seem that a composite attitude including all these, the incapacity of the grantor, the fiduciary relation, the taint of fraud in the breach of contract rooted in this relation, and the inadequacy of a legal remedy, leaves rescission as the only means of furnishing complete relief in this peculiar situation.

DISQUALIFICATION OF JUDGES BY REASON OF RELATIONSHIP TO COUNSEL.—Under the common law from the earliest times a judge was disqualified by an interest in the cause.[1] The fundamental principles of justice require that every man be given a trial by judges "as impartial as the lot of humanity will admit." In attempting to meet this requirement the early expounders of the common law realized that it was well-nigh impossible for a man to be the impartial judge of his own case, and hence the disqualifying rule was early incorporated into the English common law and is of universal application today where that system prevails.[2] *Nemo debet esse judex in causa propria.* The application of this rule is

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[12] Reeder *v.* Reeder, 89 Ky. 529, 12 S. W. 1063.
[13] Mowers *v.* Fogg, 45 N. J. E. 120, 17 Atl. 296.
[14] Frazier *v.* Miller, 16 Ill. 48. But see, *contra*, Keltner *v.* Keltner, 6 B. Mon. (Ky.) 40; Elliott *v.* Elliott, 50 Tex. Civ. App. 272, 109 S. W. 215.
[15] Wilfong *v.* Johnson, 41 W. Va. 283, 23 S. E. 730.
[16] Cooper *v.* Gum, 152 Ill. 471, 39 N. E. 267; McClelland *v.* McClelland, 176 Ill. 83, 51 N. E. 559; Glocke *v.* Glocke, *supra;* Wilfong *v.* Johnson, *supra;* Lowman *v.* Crawford, *supra;* Grant *v.* Bell, *supra.*
[17] Cooper *v.* Gum, *supra.* [18] Frazier *v.* Miller, *supra.*
[19] Pownal *v.* Taylor, *supra.*
[1] Earl of Derby's Case, 12 Coke 114; 3 BLACKSTONE, COMM. 361; 5 BRACTON, t. 5, c. 15.
[2] See Pearce *v.* Atwood, 13 Mass. 324; State *v.* Castleberry, 23 Ala. 85; Wash. Life Ins. Co. *v.* Price, 1 Hopkins (N. Y.) 1; State *v.* Crane, 36 N. J. L. 394; Meyer *v.* San Diego, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22.

so strict and stringent that it has been held that authority to preside in his own cause cannot be conferred upon a judge even by positive legislative enactment, and that the rule forms an implied exception to every grant of judicial power, however broad.[3] Moreover the common law went to the very heart of the matter and disqualified a judge who was interested in a suit, although it were brought in another's name and his own nowhere appeared on the record;[4] and it did not disqualify him if he were merely a nominal party to the suit.[5] But while very strict in enforcing this disqualification, this was the full length to which the common law went.

In more recent years, however, the States have deemed it best to enlarge the disqualification, so in nearly all the States constitutional provisions or statutes have been passed setting up other grounds of recusation. Some States have made prejudice or bias a ground for disqualification.[6] As another ground of disqualification, it is not unusual for a constitution or statute to provide that a judge who formerly acted as counsel in a case pending before him shall be disqualified to sit thereon.[7] But, perhaps, the most general of the constitutional or statutory disqualifications is relationship, by consanguinity or affinity, to either of the parties, within certain degrees, varying in the different States.[8] The simple case of relationship to one of the parties to the record has given little trouble; it is here only a matter of following the statute. It has been held, however, that such a provision does not apply where the relationship is to a merely nominal party.[9] But a question which has often arisen under such a clause is whether relationship, within the specified degree, to an attorney for one of the parties will disqualify. Though the question in this simple form has seldom arisen, it has been held that this is no ground for recusation, where the attorney did not take the case on a contingent fee.[10] It seems evident that in such a case the attorney cannot in any way be called a party to the suit, and hence cannot be brought within the statute. But the case in which the counsel is employed on a contingent fee depending upon success has given no little trouble. Some courts hold that the fact that an attorney is working on a contingent fee does not constitute

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[3] State *v.* Crane, *supra*. See COOLEY, CONST. LIM. 6 ed. 508.
[4] Foot *v.* Morgan, 1 Hill (N. Y.) 654.
[5] Philadelphia *v.* Fox, 64 Pa. St. 169.
[6] See People *v.* Compton, 123 Cal. 403, 56 Pac. 44; State *ex rel.* Anaconda Min. Co. *v.* Clancy, 30 Mont. 529, 77 Pac. 312.
[7] See People *ex rel.* Brown *v.* Yuma Dist. Ct., 26 Col. 226, 56 Pac. 1115; Tootle *v.* Bukley, 60 Kan. 446, 56 Pac. 755; State *ex rel.* Provosty *v.* Seventh Jud. Dist. Ct., 27 La. Ann. 225; Curtis *v.* Wilcox, 74 Mich. 69, 41 N. W. 863.
[8] See Howell *v.* Budd, 91 Cal. 342, 27 Pac. 747; Roberts *v.* Roberts, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108; Yazoo & M. V. R. Co. *v.* Kirk, 102 Miss. 41, 58 South. 710, 42 L. R. A. (N. S.) 1172; Vine *v.* Jones, 13 S. D. 54, 82 N. W. 82.
[9] Fowler *v.* Byers, 16 Ark. 196.
[10] People *v.* Whitney, 105 Mich. 622, 63 N. W. 765.

him a "party" to the action within the meaning of these disqualifying clauses. It is contended that the word "party" as used in connection with suits and statutes is a technical word and its meaning is to be strictly construed.[11]

Most courts, however, take the opposite view. On strictly legal principle it would seem true that an attorney acquires a potential interest in the prospective judgment as soon as he takes the case under a contract by which he is to have a specified part of the amount recovered, or a certain fee contingent upon success. Upon the making of such a binding contract it can be said that he becomes a party in interest to the suit, though he never becomes a party to the record. Where the nature of the attorney's interest is the same as that of his client's interest, it would seem that the same reason for disqualifying the judge would apply in both cases.[12] Regard should be had to the real party in interest.[13] Thus, on this strictly legal ground it would seem that relationship to an attorney working on a contingent fee should disqualify a judge, under a provision disqualifying him because of relationship to a party; and most of the cases so hold.[14] This was the view taken in the recent case of *State* v. *Pitchford* (Okla.), 141 Pac. 433, in which a judge was held disqualified to sit in a case in which his son was counsel for one of the parties on a contingent fee, where the statute disqualifies a judge to sit in any cause in which he is related to any party to said cause within the fourth degree of consanguinity or affinity.

Not only this, but the analogies support the same view. It has been held under such a statute that a judge is disqualified to sit in a suit to settle the accounts of an administrator whose surety is the judge's first cousin.[15] Nor can a judge pass upon the validity of a guardian's sale to a person related to him within the specified degree, even where the buyer is not a party to the record.[16]

But in its practical application there is a reason even better than

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[11] Bank *v.* Cook, 4 Pick. (Mass.) 405; Winston *v.* Masterson, 87 Tex. 200, 27 S. W. 768. But see limitations on this doctrine in the later case of Duncan *v.* Harder (Tex.), 122 S. W. 904, where a judge who was the father-in-law of a daughter of an intestate is held disqualified to sit in an action brought by the widow as survivor and representative of the community estate, on a note executed to the intestate during his lifetime, though the daughter never becomes a party to the record. Thus, the court modifies its broad statement in the Masterson Case to the effect that "party" is a technical word and can never be applied to one not a party to the record.

[12] White *v.* McClanahan, 133 La. 396, 63 South. 61. On the other hand, it is held that relationship to merely nominal parties does not disqualify. Fowler *v.* Byers, *supra.*

[13] White *v.* McClanahan, *supra;* Roberts *v.* Roberts, *supra;* Howell *v.* Budd, *supra;* Vine *v.* Jones, *supra;* Yazoo & M. V. R. Co. *v.* Kirk, *supra.*

[14] Crook *v.* Newborg, 124 Ala. 479, 27 South. 432, 82 Am. St. Rep. 190.

[15] Jirou *v.* Jirou (Tex.), 136 S. W. 493.
Yazoo & M. V. R. Co. *v.* Kirk, *supra.*

either of these, to support this disqualification. The purpose of such a provision is to secure to litigants a fair and impartial trial by an absolutely unbiased and unprejudiced tribunal. Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge. "Not only must the judges presiding over the courts be honest, unbiased, impartial, and disinterested in fact, but it is of the utmost importance that all suspicion to the contrary be jealously guarded against, and, if possible, completely eliminated, if we are to maintain and give full force and effect to the high ideals and salutary safeguards written in the organic law of the State." Much stress is laid upon this aspect of the situation in the principal case and in many others.[17] The full force of this is seen in one case where the appellate court upheld the judge's right to sit, but after granting a new trial on other grounds, strongly advised that he have another judge sit on the rehearing.[18]

THE RIGHT TO REGULATE THE PRACTICE OF MEDICINE UNDER THE POLICE POWER.—Every State under its police power has the right to provide for the general welfare of its people. Numerous statutes have been justified under the power of the State to provide for the public safety, order, morals, and health. One of the most important subjects for regulation in connection with the public health is the practice of medicine and surgery. This power has long been recognized.[1] All the States of the Union now have some kind of board whose duty it is to regulate the practice of medicine, and their chief duty is to grant or refuse licenses to applicants who desire to practice. The appointment and maintenance of these boards is universally held constitutional.[2] Everyone has the constitutional right to engage in any lawful trade or occupation he desires, subject only to reasonable regulation, and the requirement that a license be obtained from a board of examiners, duly appointed by the State, before he can practice medicine is a reasonable regulation.[3]

In most States the board which grants licenses has also the power to revoke them.[4] Both of these acts are within the scope of the

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[17] See especially Crook *v.* Newborg, *supra;* Yazoo & M. V. R. Co. *v.* Kirk, *supra.* But some cases presume that a judge is of too high character to be influenced by any impartiality. Allison *v.* Southern Ry. Co., 129 N. C. 336, 40 S. E. 91.

[18] Patrick *v.* Crowe, 15 Col. 543, 25 Pac. 985.

[1] *Ex parte* Smith, 10 Wend. (N. Y.) 449; Eastman *v.* State, 109 Ind. 278, 10 N. E. 97.

[2] Dent *v.* West Virginia, 129 U. S. 114; State *ex rel* Burroughs *v.* Webster, 150 Ind. 607, 50 N. E. 750.

[3] Dent *v.* West Virginia, *supra.*

[4] See Wolf *v.* State Board, 109 Minn. 360, 123 N. W. 1074; People *v* McCoy, 125 Ill. 289, 17 N. E. 786.